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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

*R. Martin  
Proc II*

**FILE: E-187130**

**DATE: January 27, 1977**

**MATTER OF: A. C. Ball Company**

**DIGEST:**

1. GAO will not disturb contracting officer's determination that prospective contractor was nonresponsible due to lack of tenacity and perseverance based on poor performance on recent contracts since finding was not unreasonable.
2. Although contracting officer erroneously mailed determination of bidder's nonresponsibility as to tenacity and perseverance to wrong SBA regional office, SBA's failure to appeal that determination may not be blamed on contracting officer where determination was received by proper SBA office prior to award. Record shows that protester was denied opportunity to have SBA appeal contracting officer's determination because SBA specialist handling such appeals was on leave when referral was received and not because contracting officer mailed determination to wrong SBA office.

A. C. Ball Company (Ball) protests the rejection of its bid on invitation for bids (IFB) No. N00123-76-B-1409 which was issued by the Naval Regional Procurement Office (NRPO), Long Beach, California.

The IFB called for the fabrication and delivery of 70 Surf Traveling Activated Remotely (STAR) devices to be used during the replenishment of ships at sea, with an option for an additional 30 units. The contracting officer rejected Ball's low bid of \$204,435 after a finding that Ball was nonresponsible due to a lack of tenacity and perseverance causing poor performance on two previous contracts for the same devices. The contracting officer then sought to notify the cognate regional office of the Small Business Administration (SBA) pursuant to Armed Services Procurement Regulation (ASPR) § 1-705.4(c), but on July 8, 1976 mistakenly sent the notice to the SBA office in Los Angeles rather than the SBA office in San Francisco in which district Ball was located. Upon expiration of the 5 day period for an SBA notice

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of intent to appeal the contracting officer's determination to the head of the procuring activity (see ASPR 1-705.4(c)(vi)), award was made on July 23, to the next highest bidder for \$228,841.

Thereafter, on July 30, 1976, the SEA office in San Francisco wrote to the contracting officer stating that although it did not receive the NRPO referral until July 14, which was after the expiration of the 5 day period, it disagreed with the contracting officer's determination because Ball's quality control system had only minor problems and the bilateral modifications extending the delivery dates of the previous contracts for consideration should have "cleared the air" with regard to the delivery delinquencies.

The record indicates that on one of the previous contracts for the same device, Ball delivered 21 months after the delivery date originally specified. While most of the 21 months were covered by contract modifications, all of the extensions were granted because of Ball's inability to meet the required delivery dates. All of the devices delivered were deficient and did not meet the specifications despite the waivers and deviations granted thereto by NRPO. Some of the devices were accepted on a "nonconforming" basis and others had to be sent to another contractor for correction of the defects before acceptance. Ball acknowledges the late deliveries but attributes them largely to errors and ambiguities in the drawings by NRPO, which were changed prior to the next procurement to eliminate the problems which it had encountered with them. Ball contends that all of the devices met the contract specifications when they were shipped.

The delivery date of the more recent contract had to be extended for three months. At the time of the determination of nonresponsibility in the instant case, it appeared to the contracting officer that the extended date would not be met. Ball also acknowledges late delivery on this contract but points out that new tooling, purchased or manufactured to improve its capability, caused some of the delay as did its efforts to obtain new suppliers. Ball contends that these efforts and its rapid relocation after its plant burned proves its tenacity and perseverance and would have insured timely delivery on this procurement.

While no pre-award survey was made with regard to this procurement, the contracting officer had available a pre-award survey report, dated two weeks prior to the bid opening, which recommended against an award to Ball of a smaller contract because of an unsatisfactory quality assurance capability. Ball points out that the SBA investigation of its quality assurance program revealed only minor problems

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and that the SBA issued a Certificate of Competency on that program on July 21, 1976. In addition, Ball contends that the quality assurance deficiencies resulted from its request to have the Government's quality representatives removed from the plant and that since their replacement, no deficiencies have been reported. Although quality control problems would normally relate to capacity rather than tenacity and perseverance, they would, in either case, concern responsibility. We believe that the contracting officer's determination of nonresponsibility did not rest, in any significant degree, upon the quality problems of Ball. The contracting officer possessed substantial evidence of Ball's delivery problems.

Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion, this Office will not disturb a determination of nonresponsibility due to a lack of tenacity and perseverance when the record provides a reasonable basis for such determination. Kennedy Van & Storage Company, Inc., B-180973, June 18, 1974, 74-1 CPD 334.

While Ball contends that the delivery problems encountered on the earlier contracts were caused by defective Government specifications, the contracting officer points out that had the problems experienced been wholly with Government specifications, the contractor would not have been required to provide consideration for slipped delivery schedules. In addition, the contracting officer notes, as indicated above, that a second contractor was needed to rework the submitted materials before they reached an acceptable level and that this work was performed for the contractor's account (although the contractor does dispute these charges). It may be, as Ball states, that its rapid plant relocation and its efforts to obtain new suppliers and improved capability indicate that the firm is making attempts to meet its contractual obligations. However, the fact remains that delivery troubles have continued to plague Ball in its more recent contract. Under these circumstances, we cannot say that the determination that Ball lacked tenacity and perseverance was arbitrary or was made without a reasonable basis.

Finally, it is clear that Ball was denied the opportunity to have the SBA timely appeal the contracting officer's determination. ASPR § 1-705.4(c)(vi) requires that a determination that a small business is nonresponsible due to a lack of tenacity and perseverance be supported by substantial evidence documented in the contract file and that this evidence be forwarded for review to the SBA. If the

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SBA disagrees with the determination, it should notify the procuring agency within 5 working days of its intent to appeal. The final decision on the appeal is made by the head of the procuring activity.

SBA San Francisco states that it would have appealed the determination in this case if the contracting officer's July 8 referral had not been originally sent to its Los Angeles office. SBA explains that by July 14, when the referral was received in San Francisco, "our specialist in these matters, who is also very knowledgeable of the A. C. Ball Co., most certainly would have appealed [the] decision in this matter; as it turned out, our specialist had been on leave since July 14, 1976."

It seems to us, however, that SBA's failure to file a timely appeal may not be justifiably explained on the basis that its specialist was on leave. Since the contracting officer's referral was received by SBA San Francisco prior to the July 23 award date, we believe that SBA could have acted on the referral in a timely manner notwithstanding the erroneous mailing of the referral. Therefore, we must conclude that the blame for SBA's failure to file a timely appeal does not rest with the contracting officer.

Accordingly, the protest is denied.

*R. F. K. H.*  
Deputy Comptroller General  
of the United States